NO. 83-91

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

APTOS SEASCAPE CORPORATION,
a California corporation,

Appellant,

vs.

THE COUNTY OF SANTA CRUZ, et al.,

Appellees.

ON APPEAL FROM THE COURT OF APPEAL
STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT

RESPONSE IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM

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I.

THE MOTION OF APPELLEES TO DISMISS THE APPEAL OR AFFIRM THE STATE COURT JUDGMENT MUST BE DENIED.

1. The Violation Of The Civil Rights Act Not Only Was Properly Raised, But Clearly Proven By Seascape.

Seascape has always stressed that its federal constitutional rights were violated by the County, beginning with

the administrative process and continuing through the pleadings, the trial, and the State Court and Federal Appellate processes. E.g., CT (Clerk's Transcript) 1-17; CT 68-89; CT 1404-1426; CT 1763; Seascape's Appellate Reply Brief; Seascape's Petition for Hearing, Appendix D; Seascape's Petition for Hearing to the California Supreme Court, Appendix F.

Furthermore, the Judgment of the trial court must, by law, be affirmed when it is supported by any legal theory, regardless of the theory advanced at trial. ***Leboire v. Royce*** (1950) 100 Cal.App.2d 610, 615, 224 P.2d 106. Seascape has clearly proven and the trial court has clearly found and determined the essential elements demonstrating an obvious violation of the Federal Civil Rights Act, 42 U.S.C. §1983. See ***Gomez v. Toledo*** (1979) 446 U.S. 635, 638, 100 S.Ct. 1920, 1922; see also Appendix B (Trial Court's Findings of Fact and Conclusions of Law) filed with the Jurisdictional Statement, page B-15, paragraph 25; page B-17, paragraph 35; pages B-17-18, paragraph 36; pages B-18-19, paragraph 37; pages B-35-37; Clerk's Transcript (CT) 1764, for example.

Moreover, Seascape pointed out the violation of 42 U.S.C. §1983 in all the appellate briefs including the initial Reply Brief of Seascape filed with the Court of Appeal (pages 29, 42, 69-70), Seascape's Reply Brief to the Amicus Brief (pages 17-18), the Petition for Rehearing filed by Seascape with the Court of Appeal (pages 3-4, Appendix D), and Seascape's Petition for Hearing filed with the California Supreme Court (pages 10-13, Appendix F). Thus, the County's argument has no merit, whatsoever.

2. The State Court Judgment Is A "Final" Judgment Pursuant To 28 U.S.C. §1257 And Mandates A Review Of This Nationwide Federal Issue.

A. The "Finality" of a Judgment is not Administered by this Court in a Mechanical Fashion.

28 U.S.C. §1257 indicates that this Court may review "final" judgments or decrees rendered by the highest court of the land. Nevertheless, this rule has *not* been administered in a mechanical fashion and there are circumstances in which there are departures from this finality for Federal Appellate jurisdiction. ***Cox Broadcasting Corp. v. Cohn*** (1975) 420 U.S. 469, 477. Furthermore, "(t)here are now at least four categories of such cases in which this Court has treated the decision of the federal issue as a final judgment for purposes of 28 U.S.C. §1257 and has taken jurisdiction without awaiting the completion of the additional proceedings anticipated in the lower State Court." *Ibid.*, page 477. [1/]

B. The Seascape Judgment is a "Final" Judgment since There are no Further Lower State Court Proceedings Pending.

1/ In any event and even had there not been a "final" judgment (which there is), several of the exceptions would apply.

In *San Diego Gas and Electric v. City of San Diego* (1981) 450 U.S. 621, 67 L.Ed.2d 551, 101 S.Ct. 1287, four Justices of this Court, with whom Justice Rehnquist concurred, concluded that this Court lacked jurisdiction and, therefore, again did not reach the issue of whether a state must provide a monetary remedy to a landowner whose rights under the Just Compensation Clause of the Fifth Amendment have been violated. *Ibid.*, p. 623.

Briefly, in *San Diego Gas and Electric*, the landowner never applied for a land development. *Ibid.*, pp. 629-630. 2/ Nevertheless, the determination of the trial court concluding that the Just Compensation Clause of the Fifth Amendment had been violated was affirmed by the State Court of Appeal in an opinion originally certified for publication. *Ibid.*, pp. 627-628. Subsequent to that ruling, the California Supreme Court remanded the matter back to

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2/ Here, Seascape has made repeated efforts to use its land through, inter alia, not only a request for approval of a subdivision map, but also through the rezoning process and the submittal to the County of the Goetz Development Plan and the Eckbo Environmental Impact Report (EIR). Jurisdictional Statement, pages 9-13; Court of Appeal Decision, Appendix C, pages 4-5. Even County Supervisor Forbus admitted that ". . . this is probably one of the most studied areas that we (the County) have . . ." Appendix K, attached hereto, CT 2333.

The County argues that Seascape is on "all fours" with ***Agins v. Tiburon, supra***, Appellees' Motion, page 20. This is patently false. For example, in ***Agins***, the residential zone placed on the five acre parcel allowed from at least one (1) home on the five acres to up to five (5) homes thereon. Further, ***Agins*** had never sought any approval for the development of the five acres. In Seascape, as mentioned above, the landowner has made repeated efforts to use the land, all to no avail. Even the Court of Appeal points out that all development of the subject property has been prohibited by the County. Appendix C, page 30.

the State Court of Appeal for a reconsideration in view of the then recent decision of the State Supreme Court in ***Agins v. Tiburon*** (1979) 24 Cal.3d 266, 157 Cal.Rptr. 372. *Ibid.*, p. 268. Thereafter, in an unpublished Opinion, the State Court of Appeal determined, inter alia, that there were purported unresolved factual issues in the record and remanded the case back to the trial court (Superior Court) for further legal proceedings. *Ibid.*, p. 629. Consequently, four Justices of this Court, with whom Justice Rehnquist concurred, determined that this Court lacked jurisdiction by stating, inter alia:

> "The logical course of action for an appellate court that finds unresolved factual disputes in the record is to remand the case for the resolution of those disputes. We therefor conclude that the Court of Appeal's decision contemplates further proceedings in the TRIAL COURT." (Emphasis added.)
>
> ***San Diego Gas and Electric v. City of San Diego, supra,*** p. 632.

In the Seascape case, the Judgment is a "final" judgment within the spirit and letter of the law since this case was *not* remanded back to the Trial Court of any resolution of purported factual disputes in the record. Consequently, this Court does have jurisdiction under 28 U.S.C. §1257.

C. The Judgment is "Final" within the Perview of 28 U.S.C. §1257 in that the Court of Appeal, in *Seascape*, Expressly Applied *Agins* and, in turn, the California State Supreme Court has Concluded that No Set of Factual Circumstances, No Matter How Severe, Can Ever Give Rise to a Fifth Amendment Taking.

In this case, the State Court of Appeal reversed the Judgment for inverse condemnation against the County based specifically on the State Court decision in ***Agins*** and, further, acknowledged that ". . . the United States Supreme Court may eventually conclude that California cannot limit the remedy available for taking to non-monetary relief . . ." Appendix C, Pages 14-15. Previously, the California Supreme Court mandated that *no* set of factual circumstances, no matter how severe, can ever give rise to a Fifth Amendment taking. ***Agins v. City of Tiburon*** (1979), ***supra***, page 273, affirmed on other grounds, 447 U.S. 255. Thus, Seascape was denied relief, as a matter of law, and Judgment is "final" as to the rejected constitutional theory. When a litigant is denied relief as a matter of law, the judgment is final within the meaning of 28 U.S.C. §1257. See ***Allenberg Cotton Co. v. Pittman*** (1974) 419 U.S. 20, 24-25; ***Windward Shipping, Ltd. v. American Radio Association*** (1973) 415 U.S. 104, 108.

D. Because of the Strangle Hold Emanating from the State Court Decision in *Agins*, California Has Improperly Insulated Itself from the Jurisdiction of the United States Supreme Court and the Federal Constitution.

The Court of Appeal decision specifically points out that the "County's zoning ordinances are complex and ambiguous, and the relationship among the various sections is confusing as is apparent from the conflicting testimony from various officials charged at various times with administration of these ordinances." Appendix C, page 29. The only confusion or conflict is created by the dichotomy between the County's conduct, in fact, and its conduct for purposes of litigation. For example, attached hereto is Appendix K, the dialogue between the Board of Supervisors (Sanson, the County Supervisor of the District in which the subject property is located) and the Planning Director (Monasch) wherein *no* credit can be given for the arroyos and beaches (the subject property) if the bench land, 43± acres are zoned R-1-6-PD (Planned Development), even if an application for a Planned Unit Development (PUD) is filed. In response, one of the County Supervisors (Forbus) pointed out that;

> ". . . just a couple more sentences here, I think that you know, a pendulum swings back and forth, it never stops in the middle, it is always over on one side or the other, and it is swung so

> completely that the only place a property owner or a man who owns anything has a place to get redress now is in the courts." Appendix K, attached, CT 2333.

Nevertheless, the Court of Appeal goes on to eliminate the award of all relief; the monetary relief, the Alternate Judgment and the recovery of litigation costs, and, then, refers to some sort of "compensating" densities. Appendix C, page 31. The reason for this not so subtle maneuver is the ***Agins v. Tiburon*** decision of the California Supreme Court.

The Court of Appeal (Appendix C, pp. 30-31), clearly emphasizes that all development of the subject property is prohibited and that it premises its ruling on some sort of "compensating" densities that may be provided at some indefinite time in the future. Clearly, there *is* a taking found by the Court, implicitly, in its ruling. The Just Compensation Clause of the Fifth Amendment requires just that; Just Compensation at the time of the taking and not the referencing of the landowner to some sort of amorphous "compensating" densities at some time in the indefinite future after jumping through another decade of mythical administrative hoops. As stated by this Court in ***United States v. Clarke*** (1980) 445 U.S. 253, 257, 100 S.Ct. 1127, 1130, an inverse condemnation action is the same as an eminent domain action except that the governmental agency is the defendant rather than the plaintiff. "The landowner is entitled to bring an action as a result of the 'self-executing haracter of the constitutional provision with respect to compensation'." *Ibid.*, p. 1130. Clearly, if this were an eminent domain proceeding, Just Compensation in the form of monetary relief would necessarily be provided

at this time by the agency to the landowner rather than dangling mirage-like "compensating" densities at some indefinite time in the future.

As pointed out in the JURISDICTIONAL STATEMENT, page 19, California is merely attempting to insulate itself from the jurisdiction of this Court and the United States Constitution. This mode of constitutional insulation will continue unless otherwise corrected by the United States Supreme Court.

The issues herein presented are of critical, nationwide importance. This Court's guidance and protection are needed not only by Seascape, but also by the citizens of California and other states. The judicial pingponging of the issues herein presented is not only extremely time consuming and expensive for Seascape, but also undermines the Federal constitutional rights of many citizens, who can ill-afford lengthy trials, pounds of appellate record and briefs, and a wistful hope that ". . . the right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is a 'personal' right . . ." protected by the United States Constitution as well as by the Civil Rights Act. ***Lynch v. Household Finance Corp.*** (1972) 405 U.S. 538, 552. [3/]

3/ The County's confusing, hodgepodge arguments are peppered with factual and legal errors, all of which are specifically denied. Nevertheless, since the errors are numerous and, in any event, not pertinent to the noting of probable jurisdiction, just a few of them are pointed out below. Further, upon the noting of probable jurisdiction, a detailed response can be made through briefing and/or oral argument.

a. Appellees incorrectly assert that the issue is merely whether a split zoning caused a taking (page 14); whereas, the trier of fact specifically determined that there was a taking without just compensation as a result of a series of actions and inactions over a period of time by the County. See Findings of Fact and Conclusions of Law of the Trial Court, paragraphs 33-37, Appendix B, pages 17-18, and paragraph 1, Appendix B, page 35.

3/ (cont.) b. The County, again, makes the misdirected argument that, since Seascape is the record owner of 110 acres and since some allegedly reasonable use is permitted on the 40 acres of bench land, it makes no difference whether the balance of the property was stolen. Motion, pages 15-16. The County made this argument with the Court of Appeal and the Court of Appeal rejected the same. Appendix C, pages 20-23. Further, the trier of fact specifically determined that, due to the County's conduct, the subject 70 acres are a de facto separate parcel. See Findings of Fact and Conclusions of Law, Trial Court, paragraph 2, Appendix B, pages 35-36.

c. County feebly argues that, since the U Zone (unclassified) has been relettered to "SU" (special use), the matter is moot; whereas, the underlying and controlling land use plan retains the subject property in permanent open space. County Motion, 13. The County is just "game-playing" in an attempt to obfuscate the already accomplished taking. "(T)he Fifth Amendment expresses a principle of fairness and not a technical rule of Proedure . . ." *United States v. Dickinson* (1947) 331 U.S. 745, 748. The case is not moot. The landowner has incurred substantial, uncompensated damages because of the violation of its federal constitutional rights.

d. Concerning the sewer moratorium referred to by the Appellee, page 17, the same is merely a smoke screen to, again, hide the confiscatory conduct of the County. The trial court analyzed this and made a specific finding pointing out that the taking resulted from the County's long-term conduct, and not from the moratorium. E.g., see Finding of Fact, paragraph 29, Appendix B, pages 15-16.

e. Appellees' reliance on *McCarthy v. Manhattan* (1953) 41 Cal.2d 879 (pg. 14-15) is as misplaced as it is preposterous. For example, in *McCarthy*, the trial court made findings that the public had used the property for 9 years (*Id.*, p. 893) and that the landowner submitted *no* evidence of the impact of the zoning ordinance on the property value and use. (*Id.*, p. 891) In Seascape, the trial court specifically determined that the public has *no* easements because of public use (e.g., Appendix B-39, paragraph 13) and, as a result of the County conduct, Seascape has been deprived of all economically viable use of its subject land. (E.g., Appendix B-35, paragraph 1.)

II.
CONCLUSION

Seascape respectfully submits that Appellees' Motion must be denied and that probable jurisdiction or the Petition for Writ of Certiorari should be granted.

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APTOS SEASCAPE CORPORATION

APPENDIX K

Portion of Official Records of County of Santa Cruz Board of Supervisors, November 28, 1972:

SANSON: ". . . Well, let me ask this of the Planning Department. If this were to come in as a Planned Unit Development would there be any credit given under the Planned Unit Ordinance for the arroyos and the beaches?

MONASCH: "Not under the zone that you are proposing, because the PD would be only on the 43 acres that you are suggesting for the R-1-6. By the way, I hope you met (sic) R-1-6-PD.

SANSON: "That is what I said." p. 5

FORBUS: ". . . the 60 some acres in the U-BS-50 which would be acutally (sic) two dwellings in the other remainder, right?

MONASCH: "Actually one, 67 is U-BS-50 and you can only make one 50 acre parcel out of it." pp 9-10

FORBUS: ". . . Well, I have a couple of comments Mr. Chairman, I think that this is probably one of the most studied areas that we have, it seems reasonable to be (sic) that this Board could come up with a density that it could live with in this area. What we are doing now basically is telling the property owner, well, we have looked at it, and we have looked at it, and we have looked at it and we are not going to tell you what density you can have, we are going to send it back to the Planning Commission to say theoretically you can go one house on 67 acres of the beach which is in itself utterly ridiculous." p. 18

FORBUS: ". . . Just a couple of more sentences here, I think that you know, a pendulum swings back and forth, it never stops in the middle, it is always over on one side or the other, and it has swung so completely that the only

place a property owner or a man who owns anything has place to get regress now is in the courts." p. 19

I hereby certify that the foregoing is a true and correct copy of a portion of the Official Records of the Santa Cruz County Board of Supervisors, dated November 28, 1972:

COUNTY BOARD OF SUPERVISORS

By _____
DEPUTY